What is in question here is whether there was waiver of a term of a contractual tenancy. Nevertheless, I think the following passage from the judgment of Parker J. in the case of *Matthews v. Smallwood*[4] regarding the waiver of a right of re-entry under a lease is very much in point :—

"Waiver of a right of re-entry can only occur where the lessor, with knowledge of the facts upon which his right to re-enter arises, does some unequivocal act recognizing the continued existence of the lease. It is not enough that he should do the act which recognizes, or appears to recognize, the continued existence of the lease, unless, at the time when the act is done, he has knowledge of the facts under which, or from which, his right of entry arose. Therefore we get the principle that, though an act of waiver operates with regard to all known breaches, it does not operate with regard to breaches which were unknown to the lessor at the time when the act took place."

Where a landlord has reason to believe or has been led to believe that his tenant in breach of a condition has sub-let to A, a man of substance, the waiver of that breach will not be effective if in point of fact the breach consisted in sub-letting to B, a man of straw. Again, if a landlord is under the impression that a party has come into occupation of his premises as a licensee that will not amount to waiver of the breach which would have been committed had the party in question in fact come into occupation as a sub-tenant. Obviously a landlord might well be disinterested in the presence on the premises of a licensee whereas he might well take the strongest objection, if he knew about it, to the presence of a party who was acquiring rights under the Control of Rent Ordinance.

In the present case, I do not think it can be said that in March, at any rate, the appellant had any reason to believe that the Yee Kuan partners even if he knew they were carrying on business in the shop were not doing so as bare licensees. Choong Sek Choon's business was still being carried on on the premises and to judge from the photograph which is in evidence his signboard was much more prominent than that of Yee Kuan. There was certainly nothing to shew that Yee Kuan had exclusive possession of the premises at that stage and without exclusive possession there could be no question of tenancy. Later on, however, the position may well have changed. In October the appellant says that Choong Sek Choon absented himself from the premises, although it is not suggested that his signboard was removed. That, in the light of the previous events, was grounds for thinking that whoever remained in occupation did so as a sub-tenant and not as a licensee. And when on top of that he learned from the Registrar of Businesses' communication of 1st November that Yee Kuan was the business name not of Choong Sek Choon but of two other persons grounds for thought became grounds for certainty that there had been a sub-letting to the two persons named so as to make it difficult to avoid the inference that he then had knowledge of what had happened. If he was in that state of having knowledge before he accepted rent on 9th November then there was waiver on his part. If he did not have that knowledge till after 9th November there was no waiver. On that point, however, as I have said, the learned President has come to no finding of fact. In the circumstances, I see no alternative to ordering a new trial as between the appellant and the Yee Kuan partners.

The cost of this appeal will abide the event of that new trial.

I would add that I have not considered the effect of any breach of the terms of the original agreement by the Yee Kuan partners after 31st December, 1954. The question of whether they then became statutory tenants will depend on the outcome of the new trial. If they are not statutory tenants the point will not arise. If they are statutory tenants there will have to be further proceedings for it will then be necessary to have the permission of the Rent Assessment Board before asking for their ejectment.

New trial ordered.

Solicitors : *Das & Co.; S. M. Sharma.*

LIM TECK SENG v. REG.

[A. Cr. J. (Rigby J.) July 6, 1956]

[Penang — Criminal Appeal No. 40 of 1954]

Criminal Procedure Code (S.S. Cap. 21) s. 182(h) — Substitution of a more serious charge at the end of the case — Motor Vehicles (Driving Offences) Proclamation, ss. 4(2) and 5.

In this case the appellant was charged with inconsiderate driving, contrary to section 5 of the Motor Vehicles (Driving Offences) Proclamation. At the close of the case and after the defence had been concluded the learned President substituted a charge of negligent driving contrary to section 4(2) of the Proclamation.

Held: the substitution of the more serious charge at the end of the case was in the circumstances unjust and therefore the conviction must be altered to one under section 5 of the Motor Vehicles (Driving Offences) Proclamation of driving without reasonable consideration.

Case referred to :—

(1) *Public Prosecutor v. Salamah binti Abdullal* (1947) M.L.J. 178.

MAGISTRATE'S CRIMINAL APPEAL.

Lee Thean-Chu for the appellant.

F. G. Cooke (Federal Counsel) for the respondent.

Rigby J. : — The appellant in this case was originally charged before the learned President, sitting as Magistrate, on a charge of inconsiderate driving, contrary to section 5 of the Motor Vehicles (Driving Offences) Proclamation. Mr. Lee Thean-Chu, who

appears for the appellant, concedes that there was in fact sufficient evidence before the learned President which, if accepted — and the learned President did accept it — justified a conviction on this charge of inconsiderate driving.

It appears, however, that at the close of the case and after the defence had been concluded the learned President then amended (in fact it would be more correct to say substituted) the charge to a more serious one of negligent driving, contrary to section 4(2) of the Motor Vehicles (Driving Offences) Proclamation.

On the desirability or otherwise of amending a charge in this matter at the conclusion of the case I cannot do better than quote a passage from the judgment of Taylor J. in the case of *Public Prosecutor v. Salamah binti Abdullah*[1]. In the course of that judgment Taylor J. said :—

"Now the proper time to amend a charge is at the close of the prosecution. This is expressly provided by Section 173(h) (Section 182(h) of the Settlement Code) of the Code which, indeed, not merely authorises but positively requires the Court to consider the charge at that stage and, if necessary, amend it. It is true that a charge can be altered at any stage and the alteration in this case, late though it was, is not illegal in the sense that it was not in accordance with the Code but in my view it was in the circumstances unjust. It was not an amendment but a substitution and further, it was the substitution of a (much) more serious charge."

I respectfully associate myself with that passage, and in my view, it applies entirely to the circumstances of this case.

The appeal is, therefore, allowed to the extent that the conviction is altered from one under section 4(2) of negligent driving to one under section 5 of driving without reasonable consideration. The fine of $50 will stand, but since there is no power to endorse a licence on a conviction under section 5 the order for endorsement must be set aside.

Order accordingly.

PUBLIC PROSECUTOR v. DE FONSEKA

[A. Cr. J. (Smith J.) September 7, 1956]

[K.L. — Criminal Appeal No. 37 of 1956]

Penal Code s. 197 — False medical certificate of unfitness — Meaning of "false" — Whether certificate required by law — Admissibility.

Employees Provident Fund Ordinance, 1951 ss. 13, 20 & 21 — Withdrawal of credit funds — Employees Provident Fund Rules, 1952, rr. 19 & 20.

The respondent, a registered medical practitioner, gave three medical certificates each to the effect that the person named therein was no longer capable of being employed and not likely to be employed again when it appeared that they had not in fact been examined by him. Those certificates were then used to obtain from the Employees Provident Fund the return of the amount standing to the credit of the persons named in each certificate. The respondent was charged on three similar charges of which the first read: "That you on 19th September, 1955 at Kuala Lumpur, in the State of Selangor, issued a certificate required by law to be given knowing that such certificate is false in a material point to wit that Chan Ah Kok was no longer capable of being again an employee and thereby committed an offence punishable under section 197 of the Penal Code."

At the close of the prosecution's case, the learned President of the Sessions Court acquitted and discharged the respondent on the ground that the medical certificates were not required by law to be given and were not by law admissible in evidence, being certificates submitted for consideration only which the Employees Provident Fund Board need not accept if the Board felt so inclined. On appeal,

Held: (1) a certificate of unfitness signed by a medical practitioner is required by law to be given when application for withdrawal is made on grounds of medical unfitness and such a certificate is medical evidence for the purpose of section 13(1)(c) of the Employees Provident Fund Ordinance, 1951;

(2) as the respondent had not examined the persons named therein a certificate given in such circumstances is "false", even if by chance the certificate is correct in all details since the giver of the certificate does not know it to be true and is therefore without knowledge or grounds for belief;

(3) for an offence under section 197 of the Penal Code it is not necessary to show that it is incumbent on the signatory as a requirement of law to sign the certificate;

(4) the medical certificate is admissible in evidence as such certificate without further proof, as the Employees Provident Fund Board could accept the certificate as evidence of unfitness to prove its truth (**Prafulla Kumar Khara & Anor. v. R.**[1] distinguished).

Held, further: as section 20(1)(f) of the Employees Provident Fund Ordinance confers on the Board the power to prescribe evidence for the purposes of section 13 of the aforesaid Ordinance there was equally evidence to support a charge against the respondent of "signing a certificate relating to a fact of which such certificate is by law admissible in evidence" under section 197 of the Penal Code.

Case referred to :—

(1) *Prafulla Kumar Khara & Anor. v. R.* A.I.R. (30) 1943 Cal. 40.

MAGISTRATE'S CRIMINAL APPEAL.

E. Brown (Federal Counsel) for the appellant.

R. P. S. Rajasooria for the respondents.

Smith J. : — The respondent was charged on three similar charges of which the first read as follows :—

"That you on 19th September, 1955 at Kuala Lumpur, in the State of Selangor, issued a certificate required by law to be given knowing that such certificate is false in a material point to wit that Chan Ah Kok was no longer capable of being again an employee and thereby committed an offence punishable under section 197 of the Penal Code."

Evidence led by the prosecution was to the effect that the respondent, a registered medical practitioner, had given three medical certificates each to the effect that the person named therein was no longer capable of being employed and not likely to be an employee again. The person named in each certificate gave